No. 93-1023

MAR 30 1994

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD BARTH, PETITIONER

v.

JOSEPH D. DUFFY, DIRECTOR,
UNITED STATES INFORMATION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether under the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, an employer may consider the different benefits and burdens of accommodating existing employees and applicants as a factor in determining whether a particular accommodation creates an "undue hardship."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 2 F.3d 1180. The opinion of the district court (Pet. App. 21a-37a) is reported at 761 F. Supp. 830.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1993. By order of Chief Justice Rehnquist, dated November 16, 1993, the time for filing a petition for a writ of certiorari was extended to and including December 27, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an insulin-dependent diabetic. He is an engineer and computer specialist who has been employed in a civil service position for a number of years by the Voice of America (VOA), a component of the United States Information Agency (USIA). In 1988 he sought admission to the permanent Foreign Service in order to be placed as a Foreign Service Specialist/Radio Engineer with VOA's overseas radio relay stations. Petitioner qualified for this placement except that he was not granted the necessary medical clearance due to his severe diabetes. His request for a waiver of medical clearance was denied because he could safely be assigned to, at most, three or four overseas relay stations (out of 12 worldwide) where adequate medical facilities would be available to treat his condition. Pet. App. 2a-3a, 21a-22a.

Petitioner brought suit alleging that the failure to hire him as a Foreign Service Specialist violated the Rehabilitation Act of 1973, as amended. See 29 U.S.C. 791, 794(a) and 794a(a)(1). After a four-day bench trial, the district court found no violation. Pet. App. 21a-37a. The court of appeals affirmed. *Id.* at 1a-20a.

1. In 1988, VOA had a total of 12 overseas relay stations located in Antigua, Belize, Botswana, Thailand, Sri Lanka, Greece, Liberia, Germany, the Philippines, Costa Rica, and Morocco. VOA's relay stations receive and transmit programs virtually nonstop throughout the year. VOA relay stations are staffed by local nationals under the supervision of American Foreign Service Specialists. Approximately 70 Foreign Service Specialists staff five levels of positions at the various sites: station manager, deputy station manager, plant supervisor, assistant plant supervisor, and technician. Pet. App. 22a. All but two of the relay stations (Kavala, Greece, and

Munich, Germany) are in tropical or semi-tropical climates. Most of the stations are in sparsely settled, remote areas with access only to the most rudimentary medical facilities. *Id.* at 28a-29a.

Like other candidates for Foreign Service appointments, those seeking a Specialist position at an overseas radio relay station must be medically cleared by the State Department for world-wide assignability. See 22 U.S.C. 3901(a)(4); 3 Foreign Affairs Manual (FAM) § 684.7 (Nov. 30, 1989); Pet. App. 23a. Petitioner did not qualify for a State Department medical clearance because, as an insulin-dependent diabetic, he could safely serve only in locations with advanced medical facilities. Pet. App. 2a.

Petitioner applied to the VOA for a waiver restricting his assignments to posts with suitable medical facilities. Pet. App. 3a; see 3 FAM § 684.7-1(f) (Nov. 30, 1989). VOA convened an administrative waiver panel, which received evidence from, *inter alia*, the State Department medical official and petitioner's personal physicians (endocrinologist, vascular specialist and retinal specialist). The panel denied the waiver. Specifically, VOA concluded that petitioner's medical condition[1] was such that he could have functioned at only three or four posts (Munich, Bangkok, the Philippines, and possibly Sri Lanka) where adequate medical care would reasonably have been available to him. Pet. App. 31a, 37a. Accordingly, VOA informed petitioner that he could not be

[1] Petitioner suffered from advanced, progressive degenerative diabetes, making him prone to infection and vulnerable to severe complications from dehydration. He had experienced episodes of neuropathies of his hands and legs and proliferative retinopathy. At the time of his application he had a persistent unhealed ulcer on his foot. Pet. App. 30a, 32a-33a.

considered for appointment because his "assignment abroad * * * would not be in the best interest of the U.S. government." 2 C.A. App. 11.

2. Petitioner brought suit under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, 794 and 794a *et seq.* (1988), alleging handicap discrimination and asking the court to order his assignment to a suitable overseas relay station position and to award him backpay. Pet. App. 3a. Following a four-day bench trial, the district court found that, in denying petitioner a waiver of the medical clearance requirement, the VOA had not failed reasonably to accommodate his handicap under 29 C.F.R. 1613.704.[2] The court explained:

> A Foreign Service Specialist [in the radio relay service] normally has a tour of duty that obliges him to serve at more than a single station. He or she must gain experience to move through the grades from technician to assistant plant supervisor, plant supervisor, deputy station manager to station manager. This is achieved, in part, by movement of specialists to different sites as vacancies develop and also to meet emergency conditions requiring added manpower. Political developments or natural disasters at a particular site may force its suspension or closing, as has occurred in the past, requiring transfers on short notice. * * * Specialists who have been highly trained on the job sometimes need to be transferred to meet temporary illness or for rest

[2] That provision states:

> An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

> from stress that accompanies most assignments under the staffing and living conditions previously mentioned. It is obvious that flexibility of assignment is an essential feature of the program. * * * The stations have as few as three Specialists assigned, and, accordingly, management strives to promptly fill vacant posts.

Pet. App. 29a-30a (footnote omitted). As a general rule, the court found, VOA favors "adaptability to at least 75 percent of posts," although it has accommodated certain handicapped applicants "where the waiver committee found there were adequate facilities at 'the great majority' or even 'a majority' of VOA overseas posts." *Id.* at 31a. The court found that VOA denied petitioner's request for a waiver because of "genuine concern that [he] would face life-threatening risks if assigned away from the three most [medically] suitable posts" and because "[t]he job involved more flexibility and wider availability than [petitioner] could offer." The court also noted VOA's explanation that "[i]ndividuals already employed who required reassignment because of illness contracted on the job needed postings to the more sanitary, less stressful posts, and morale would suffer if these posts were permanently staffed by Specialists unable to work elsewhere." *Id.* at 32a. Finding no persuasive proof that VOA's conclusions were erroneous (*id.* at 33a), and independently finding that at the time he sought the waiver petitioner "could function at only three or four posts" (*id.* at 37a), the court concluded that "as a matter of law such an accommodation would place an undue burden on the VOA program." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-20a. Based on its examination of the record and the district court's unchallenged findings of fact, the court held that

VOA had met its burden[3] of demonstrating undue hardship "by virtue of the loss of essential operational flexibility that would have resulted from an attempt to accommodate [petitioner's] medical needs." *Id.* at 17a. The court rejected petitioner's contention that, because VOA has accommodated employees who have incurred medical problems on overseas duty or whose children have particular educational needs, the agency should be expected to make the accommodation requested by petitioner here. *Id.* at 18a. The court explained that, *id.* at 19a, "[a]n agency is entitled both to take the measure of the burden imposed by an accommodation net of its benefits and to take account of the duty of care, whether legal or not, that is owed employees who develop problems while on the job." The court accordingly "decline[d] to find that the disparate treatment [petitioner] complains of constitutes handicap discrimination within the meaning of the [Rehabilitation] Act."

ARGUMENT

The decision of the court of appeals involves the application of a standard "undue hardship" analysis under the Rehabilitation Act to the facts of a particular medical waiver request. The court's decision is correct and does not conflict with the decisions of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioner now accepts (Pet. 9) that the Rehabilitation Act does not require "that whenever an employer

[3] The bulk of the court of appeals' opinion (Pet. App. 4a-15a) concerned the allocation of the burden of demonstrating undue hardship in a Rehabilitation Act case. The court concluded (*id.* at 13a) that "undue hardship" is an affirmative defense, for which the burden is on the party asserting the defense. Petitioner does not challenge that holding here.

provides an accommodation to a particular employee it must similarly provide that accommodation to all applicants." He concedes (*ibid.*) that the Act instead "requires a case-by-case analysis" to determine whether an employer can decline to provide a particular accommodation to an individual on the basis of "undue hardship."

Petitioner nevertheless contends (Pet. 10) that, instead of undertaking the proper analysis in this case, the court of appeals held that "applicants *as a class* are entitled to less protection under the Rehabilitation Act." That, however, was not the court's holding. Although the court of appeals noted as a general matter that an employer might gain benefits from accommodating employees that it would not gain from accommodating applicants, there was no evidence in the case of any general policy on the part of VOA of systematically accommodating employees while denying accommodation to similarly situated applicants. And, contrary to petitioner's assertion (Pet. 3), there was also no evidence (and petitioner offers none) that accommodation was made, much less "routinely," for either applicants or employees with limitations on assignability as severe as petitioner's. The district court found as an unchallenged fact that petitioner could be assigned, at most, to a handful of posts in the radio relay system (out of a total of 12), and only to those that posed the least hardship. Pet. App. 31a, 37a.[4] The court found in addition that while 75% assignability was the general rule, VOA had made exceptions in the past for a few applicants who could serve at a *majority* of the 12 posts (*id.* at 31a). The accommodation requested by petitioner—which entailed being unavailable for the

[4] The medical facilities for one of the four posts, Clarke Air Base in the Philippines, no longer exist.

majority of posts—is thus not remotely comparable as a factual matter.[5]

2. In any event, the court of appeals' acknowledgment that different factors generally pertain in accommodating the special needs of existing employees compared with applicants is fully consistent with the requirements of the Rehabilitation Act and with the proper analysis of whether employing a person coming within the reach of the Act poses an "undue hardship" to the employer.

Federal employers are obliged by the Rehabilitation Act, 29 U.S.C. 791(b) (1988 & Supp. IV 1992), to provide reasonable accommodation for the handicapped, "tak[ing] into account the reasonableness of the cost of any necessary work place accommodation." 29 U.S.C. 794a(a)(1). See *Carter* v. *Bennett*, 840 F.2d 63, 65 (D.C. Cir. 1988); *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 307 & N.21 (5th Cir. 1981); *Gardner* v. *Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985). See also 29 C.F.R. 1613.704(a)-

[5] Specifically, the record below showed that, of the 32 requests for medical waivers (other than petitioner's) considered by VOA between 1983 and 1989, 15 waivers (of 16 requested) were granted to employees or their dependents and ten waivers (of 16 requested) were granted to applicants or their dependents. 2 C.A. App. 16-30. The vast majority (18, comprising nine employees or dependents and nine applicants or dependents) were granted without *any* limitation on assignability. *Id.* at 29-30. Of the seven waivers granted with limitation, none involved persons with limitations similar to petitioner's. *Id.* at 16-30.

VOA stipulated (2 C.A. App. 4) that accommodation is also made based on available school facilities for employees' children, but there was no evidence of the degree of limitation on assignability, if any, that such accommodation might entail. Moreover, accommodations for educational reasons are by their nature temporary, and are thus not comparable to petitioner's permanent limits on assignability.

(b).[6] As petitioner concedes, the "undue hardship" determination necessarily involves a fact-specific inquiry and a "case-by-case analysis." Pet. 9. See *Minkus* v. *Metropolitan Sanitary Dist.*, 600 F.2d 80, 81 (7th Cir. 1979) ("the determination of whether an employer can reasonably accommodate a person's religious beliefs without undue hardship is basically a question of fact" and "necessarily depends upon its own facts and circumstances").[7]

In this case the district court, in a decision upheld by the court of appeals, determined that the burdens on the employer of accommodating petitioner in this case were so great as to relieve the employer of the obligation to accommodate his medical needs. In responding to petitioner's argument that, because the employer had agreed to accommodate existing employees' requests for limited assignment, it should be required to do the same for an applicant such as petitioner, the court of appeals pointed out that there are some "benefits that agencies derive from accommodating the special needs of existing

[6] Among the factors to be considered in determining whether a particular accommodation would impose an undue hardship on an agency's operation are: (1) the "size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation." 29 C.F.R. 1613.704(c).

[7] As the court of appeals noted (Pet. App. 6a), the Rehabilitation Act, 29 U.S.C. 794a(a)(2), directs that the "remedies, procedures, and rights set forth in [Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16] shall be available" to an employee or applicant aggrieved under Section 791. Thus, courts look to the body of law developed under Title VII, particularly the analogous Title VII requirement to make a reasonable accommodation to employees' religious beliefs, in enforcing comparable rights under the Rehabilitation Act.

employees, which they do not gain from serving those of applicants." Those advantages include the retention of a skilled and loyal work force, and improved morale and productivity. Pet. App. 18a. As the court of appeals held, *id.* at 19a, the employer "is entitled * * * to take account of" the benefits accruing from accommodating the special needs of employees that may be absent from the cost/benefit calculation for accommodating applicants.[8] These benefits, to the extent they are present on the facts of a given case, are thus merely factors to be weighed; nothing in the court's opinion dictates the weight to be given, or preordains the outcome of the "undue hardship" analysis in any particular instance. (Because such benefits ordinarily are not forthcoming when *applicants* request an accommodation, however, the accommodation of a particular applicant might be found to pose an undue hardship, whereas the accommodation of an otherwise similarly situated employee might not.)

In this case, the district court specifically found that accommodating an applicant for the VOA Specialist position posed a greater burden on the employer, and offered fewer benefits, than accommodating those already employed by the agency. Cf. Pet. 10 n.2 (claiming that the "undue hardship" factors "are the same whether VOA is accommodating an employee or an applicant"). For example, the court found (Pet. App. 29a) that upward

[8] In administering the closely analogous requirements of the Americans With Disabilities Act (ADA), the EEOC has recognized that the accommodation owed applicants might not be the same as that owed employees. See EEOC, *Technical Assistance Manual for the Americans With Disabilities Act* (1992) III-24 ("[c]onsideration of reassignment is only required for *employees*"). See also 29 U.S.C. 791(g) (Supp. IV 1992) (applying the standards of Title I of the ADA to federal employment).

mobility in the thinly staffed radio relay service was dependent upon the flexibility to move Specialists among the 12 job posts as vacancies developed. The court further noted that "Specialists who have been highly trained on the job sometimes need to be transferred to meet temporary illness or for rest from stress that accompanies most assignments." *Id.* at 29a-30a. In these circumstances, the court found (*id.* at 36a) that "[a]ccepting applicants who could basically only work on a few non-hardship posts would be considered unfair to other Specialists and detrimental to morale and success of the program."[9]

It is not novel in assessing "undue hardship" to take account of the intrusion posed by an accommodation into the settled expectations of existing employees (or even the interests of other applicants). For example, in *Treadwell* v. *Alexander*, 707 F.2d 473, 477-478 (11th Cir. 1983), the court of appeals held that the Army Corps of Engineers would suffer undue hardship if forced to require a thinly stretched staff of park technicians to "double-up" their performance of some of the more strenuous duties of the job for the benefit of a handicapped applicant who was not physically able to perform arduous but essential functions in patrolling the park. And in remanding for an evaluation of the hardship of scheduling a civil service exam so as not to conflict with

[9] There was testimony (1 C.A. App. 167-168) that Munich, one of the posts to which petitioner could safely be assigned, was staffed at only the top three levels of the five levels of positions in the radio relay service, and would not be staffed by entry-level personnel such as petitioner. Accordingly, to assign petitioner to Munich would clearly have interfered with the upward mobility of more experienced personnel, and would have prevented or delayed the assignment there of persons who had already served in several hardship posts.

a Saturday sabbath, the Seventh Circuit in *Minkus* v. *Metropolitan Sanitary Dist.*, 600 F.2d at 84, acknowledged the need for a "delicate balancing of the interests of the plaintiff, the Sanitary District, and other applicants for positions with the District" for whom a non-Saturday examination schedule could create hardship. Thus, the court of appeals' willingness in this case to consider the needs of existing employees in an "undue hardship" analysis breaks no new ground under the Rehabilitation Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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